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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication No. 2628/2015*, **

Submitted by:	Rebeca Elvira Delgado Burgoa (represented by counsel, Mr. Zambrana Sea)
Alleged victim:	The author
State party:	Plurinational State of Bolivia
Date of communication:	8 June 2015
Document references:	Special Rapporteurs' rule 97 decision, transmitted to the State party on 3 July 2015 (not issued in document form)
Date of adoption of Views:	28 March 2018
Subject matter:	Disqualification of former deputy from seeking the office of mayor
Procedural issues:	Non-exhaustion of domestic remedies, abuse of the right of submission, insufficient substantiation of the complaint, incompatibility with the provisions of the Covenant
Substantive issues:	Right to be elected and to have access to public service, prohibition of discrimination, due process guarantees
Articles of the Covenant:	2 (1), 2 (2), 2 (3), 14 (1), 25 and 26
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

1.1 The author of the communication is Rebeca Elvira Delgado Burgoa, a national of the Plurinational State of Bolivia born in 1966. She claims that the State party has violated her rights under articles 2 (1), 2 (2), 2 (3), 14 (1), 25 and 26 of the Covenant. The author is represented by counsel. The Optional Protocol entered into force for the State party on 12 November 1982.

* Adopted by the Committee at its 122nd session (12 March to 6 April 2018).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Ivana Jelić, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

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1.2 On 22 October 2015, the Special Rapporteurs on new communications and interim measures, acting on behalf of the Committee, rejected the State party's request that the admissibility of the communication be considered separately from its merits.

The facts as submitted by the author

2.1 After the author had held several political positions, including those of Presidential Delegate of the Department of Cochabamba and Deputy Minister of Government Coordination in 2008, she stood as a candidate for the position of First Deputy of the Department of Cochabamba, as a member of the Movimiento al Socialismo-Instrumento Político por la Soberanía de los Pueblos (MAS) party,[1] in the general elections held on 6 December 2009. After MAS won a sweeping electoral victory, the first Plurinational Legislative Assembly[2] was formed for the period 2010–2015, during which time the author was party leader for the Department of Cochabamba. She also served as President of the Andean Parliament[3] in 2011–2012 and as President of the Chamber of Deputies of the Plurinational State of Bolivia in 2012–2013.

2.2 While serving as President of the Chamber of Deputies, the author criticized "interference by the executive" and what she believed were unconstitutional provisions in a bill on the forfeiture of property to the State. These comments caused tension within the MAS party. That tension subsequently increased when the author criticized a ruling by the Plurinational Constitutional Court upholding the constitutionality of the election of President Evo Morales to a third term.[4] The author then encountered strong opposition within MAS and was no longer allowed to attend party meetings. Nonetheless, she continued to denounce certain actions by the executive branch and to call for the investigation of government authorities in several corruption cases, including the so-called "extortion ring".[5] As a result, Vice-President Álvaro García made public statements calling for the author to be "politically destroyed" for her "constant criticism of the process of change".

2.3 On 28 April 2014, the authorities of the Plurinational Electoral Branch[6] scheduled general elections for 12 October 2014. In those elections, members of the Plurinational Legislative Assembly (deputies and senators) who were serving in the 2010–2015 term were eligible to stand for re-election to the Assembly for the 2015–2020 term,[7] even though all of them had lived in La Paz during the preceding term, as that was where the legislature was located. While article 149 of the Constitution requires candidates for election to the Plurinational Legislative Assembly to have "resided permanently in the corresponding electoral district for at least the two years immediately preceding the election", the electoral authorities held that members of the national legislature should be deemed to have

[1] The party led by President Evo Morales Ayma, which has held the executive since 2006.

[2] The legislative body of the Plurinational State of Bolivia.

[3] The legislative body of the Andean Community, established under a treaty signed in La Paz in 1979 by the Ministers for Foreign Affairs of the Plurinational State of Bolivia, Colombia, Ecuador, Peru and the Bolivarian Republic of Venezuela.

[4] That judgment upheld the constitutional challenge *in abstracto* filed by President Morales to contest the constitutional limit of two consecutive terms of office. The judgment also repealed several articles of the Electoral Act.

[5] The author states that the "extortion ring" consisted of high-ranking officials in the executive and judicial branches and that it operated by bringing charges against political opponents and others, then extorting money from them in exchange for not arresting them or for granting them early release from prison.

[6] The Plurinational Electoral Branch is one of the four branches of government of the Plurinational State of Bolivia, along with the legislative, executive and judicial branches, all of which are coequal under the Constitution. It is responsible for administering the democratic system, the civil registry and electoral justice; overseeing political organizations; and organizing, administering and carrying out electoral processes. It is made up of the Supreme Electoral Court, departmental electoral courts, district electoral courts, polling station panels and electoral officials (articles 1–5 of Act No. 18 on the Plurinational Electoral Branch).

[7] The author notes that at least six senators who had served in the Assembly in the 2010–2015 term were deemed eligible and were subsequently elected as representatives of their respective departments for the 2015–2020 term.

permanent residency in the departments they represented, not in the place where they discharged their duties as Assembly members, i.e. La Paz.

2.4 Articles 285.I and 287.I of the Constitution[8] specify the same two-year permanent residency requirement for candidates for election to executive bodies, councils and assemblies of autonomous local governments.[9]

2.5 On 30 October 2014, Transitional Electoral Act No. 587 on the 2015 subnational elections was promulgated. This law provided that the criteria applied in the preceding elections, held on 4 April 2010, for the composition of subnational bodies and election to those bodies should also apply in the subnational elections of 29 March 2015. On 14 November 2014, the Supreme Electoral Court issued circular No. 52/2014, under which candidates were required to prove their residency in the corresponding department by submitting a voluntary statement certified by a notary and a certificate of registration in the voter roll of the place where they were standing for election. In December 2014, regulations for the election of departmental, regional and municipal political authorities in the 2015 subnational elections were adopted; these regulations confirmed the conditions set out in circular No. 52/2014.

2.6 The author notes that, after it became publicly known that several members of the 2010–2015 Assembly who were dissident members of MAS were planning to stand in the 2015 subnational elections as candidates for mayor in various large municipalities, on 18 December 2014 the Supreme Electoral Court issued circular No. 71/2014, under which persons who had been members of the Plurinational Legislative Assembly in the 2010–2015 term were not permitted to stand for any subnational office except those of governor or member of a departmental assembly.[10]

2.7 On 18 December 2014, the Senate and the Chamber of Deputies issued separate statements rejecting circular No. 71/2014 as a violation of article 26 of the Constitution, which guarantees the free exercise of citizens' political rights.

2.8 On 29 December 2014, the author, through the Frente Único ("United Front") political coalition, registered as a candidate for mayor of the Province of Cercado in the Department of Cochabamba. To certify her residency, she submitted a voluntary statement certified by a notary and a certificate of voter registration in that locality, as required by Transitional Electoral Act No. 587 and circular No. 52/2014, together with a certificate of residency issued by the police. On 13 January 2015, the Departmental Electoral Court of Cochabamba issued decision No. 09/2015, whereby it found that the author was ineligible, under circular No. 71/2014, to stand for election to the office of mayor because she had served as a deputy during the previous legislative term.

2.9 The author filed an appeal against this ruling with the Supreme Electoral Court. The appeal was dismissed by decision No. 93/2015 of 19 January 2015 on the grounds that the

[8] Article 285: "I. Candidates for elective office in the executive bodies of autonomous local governments shall be required to meet the general conditions for access to public service, and: 1. To have permanently resided in the corresponding department, region or municipality for at least the two years immediately preceding the election".

Article 287: "I. Candidates for election to councils and assemblies of autonomous local governments shall be required to meet the general conditions for access to public service, and: 1. To have permanently resided in the corresponding jurisdiction for at least the two years immediately preceding the election".

[9] "Autonomous" entities consist of regions, departments, municipalities and autonomous indigenous campesino communities.

[10] Circular No. 71/2014 provides as follows: "The Supreme Electoral Court reminds political organizations (...) that pursuant to arts. 285.I.1 and 287.I.1 of the Constitution, candidates for this subnational electoral process must, among other requirements, have resided permanently in the constituency where they are standing for office for at least the two years immediately preceding the elections. In consequence, persons who were members of the Plurinational Legislative Assembly (senators and deputies) in the 2010–2015 term may not stand as candidates for provincial governor, district administrator, district development executive, mayor, regional assembly member or municipal council member. The departmental electoral courts are instructed to ensure compliance with the present circular and to have their secretariats notify political organizations accordingly."

author did not meet the requirement to have resided permanently in Cochabamba for at least the two years preceding the election, as established by article 285.I of the Constitution.

2.10 The author states that the decision of the Supreme Electoral Court is not subject to appeal, pursuant to article 11 of Act No. 18 on the Plurinational Electoral Branch, and that domestic remedies have therefore been exhausted. Nevertheless, on 28 January 2015, the author filed for the constitutional remedy of *amparo* against decisions Nos. 09/2015 and 93/2015.[11] On 29 January 2015, the First Civil Division of the Departmental Court of Justice of La Paz, acting as a supervisory court, issued an order concerning matters of form and substantiation of the author's personal data. After those issues had been rectified, the Court issued a new order on 4 February 2015 stating that the application for *amparo* was deemed not to have been submitted because the author's marital status was not indicated. After a new application for *amparo* had been filed, the Court scheduled several hearings of which proper notice was not given in Cochabamba, causing successive postponements. Subsequently, the Court officials responsible for sending the file by courier to Cochabamba kept the money for the delivery fee, causing further delays. Finally, on 9 March 2015, the Court held a hearing and adopted decision No. 08/2015, whereby it denied *amparo* on the grounds that the author had resided "temporarily" in La Paz for the two years preceding the elections. The Court also held that circular No. 71/2014 was "only a reminder for political organizations and did not affect the rights of third persons".

2.11 The author states that the supervisory court should have automatically submitted its ruling, within 24 hours, to the Plurinational Constitutional Court for a review judgment either upholding or overturning the ruling within a maximum of 50 days, in accordance with articles 41 to 43 of the Constitution. However, at the time of submission of the present communication, the Plurinational Constitutional Court had not yet issued a ruling, even though the statutory deadline had passed.

The complaint

3.1 The author maintains that circular No. 71/2014 goes beyond the provisions of the Constitution by not allowing members of the national legislature (deputies and senators) to stand for election to certain subnational positions. The author contends that the two-year residency requirement established in articles 285.I and 287.I of the Constitution is intended to prevent citizens who are unfamiliar with the issues in a given constituency from standing for elective office in those areas, not to prevent members of the national legislature, who were obliged to move to La Paz in order to discharge the mandate conferred by the voters, from standing for election to other representative positions in their constituencies. With circular No. 71/2014, the Supreme Electoral Court has restricted political rights despite not having the authority to interpret the Constitution[12] or to legislate. The author notes that, after she was elected as a deputy for the Department of Cochabamba in the 2009 general elections, throughout the 2010–2015 term she generally went to La Paz during the week to perform her duties as a deputy and returned to her permanent residence in Cochabamba on weekends and for the weekly meetings she chaired in that city in her capacity as a party leader. Accordingly, circular No. 71/2014 and its application to her case in order to disqualify her as a candidate for mayor in the elections of 29 March 2015 violated her right under article 25 (b) of the Covenant.

3.2 The author claims to be a victim of discriminatory treatment in relation to the following persons who were national Assembly members in the 2010–2015 term and resided in La Paz during that period: (a) those who were allowed to stand as candidates in the general elections of 12 October 2014 for re-election as senators or deputies for the 2015–2020 term (see para. 2.3); (b) those who stood for election as governors or as members of departmental assemblies in the elections of 29 March 2015, as those positions

[11] The author states that, according to the jurisprudence of the Plurinational Constitutional Court, the constitutional remedy of *amparo* is a special remedy (citing that Court's judgment No. 94/2015 of 13 February 2015).

[12] The author notes that, pursuant to article 4 (III) of Act No. 27 on the Plurinational Constitutional Court, the power to interpret the Constitution is vested in the Plurinational Constitutional Court and the Plurinational Legislative Assembly.

were excluded, without justification, from the prohibition laid down in circular No. 71/2014, even though they are the highest-ranking positions at the subnational level; and (c) those who stood for election to subnational positions in the Department of La Paz in the elections of 29 March 2015. The circular was intended to ensure that those national legislators who served in the 2010–2015 term and were dissident members of MAS,[13] including the author, were barred from the electoral race by reason of their political opinion or position, in violation of articles 25 (c) and 26 of the Covenant.

3.3 The author further alleges that circular No. 71/2014 was neither objective nor reasonable, as it unjustifiably prevented members of the 2010–2015 Plurinational Legislative Assembly from standing as candidates for certain subnational positions but not for others, such as those of governor and departmental assembly member. Accordingly, the disqualification of the author as a candidate for mayor was not based on objective and reasonable criteria, in violation of article 25 (a) and (b), read in conjunction with articles 2 (1) and 26, of the Covenant.[14]

3.4 The author adds that the residency requirement established by both the Constitution and domestic legislation is "unreasonable" and "discriminatory".[15] The author claims that her disqualification as a candidate for mayor because of the residency requirement amounts to an additional violation of articles 25 and 26 of the Covenant.

3.5 The author contends that the electoral branch, which administers justice in electoral matters through the departmental electoral courts and the Supreme Electoral Court, is not independent of the executive branch, in violation of article 14 (1) of the Covenant. This lack of independence was manifested in the preferential treatment of MAS candidates through the disqualification of candidates belonging to other parties in the subnational elections of 2015 after the legal personality of those parties had been revoked. She also observes that, during those elections, President Evo Morales and Vice-President Álvaro García publicly threatened to refrain from implementing public works in several municipalities unless the residents voted for MAS candidates. While the electoral branch should have submitted information to the Public Prosecution Service with a view to the criminal investigation of such conduct, it did not take any action. The Office of the Ombudsman, in a public statement issued on 27 March 2015, expressed concern that the electoral branch was not acting with due transparency, efficiency, diligence and responsibility in relation to the elections to be held on 29 March 2015. The close ties between members of the Supreme Electoral Court and MAS are cited as evidence of the Court's lack of independence. Such members include the Vice-President of the Court, who was appointed directly by President Evo Morales, and three other members, all of whom signed decision No. 93/2015 confirming the author's disqualification.

3.6 The author contends that the Supreme Electoral Court also lacked impartiality, since, in the days preceding the decision on the author's appeal, there were six instances in which members of the Court let their verdict be known in public statements.[16] The Supreme Electoral Court's issuance of circular No. 71/2014, which harmed only the interests of candidates who were dissident members of MAS and advanced the interests of other MAS candidates, is another sign that the Court lacked impartiality.[17]

3.7 The author observes that both the Supreme Electoral Court and the Departmental Court of Justice of La Paz interpreted domestic provisions in an arbitrary manner, since both the Constitution (arts. 285.I and 287.I) and circular No. 52/2014 require candidates to

[13] The author refers to other dissident MAS members of the national legislature who were treated in the same way after they expressed views that diverged from the party's position.

[14] In this regard, the author invokes the Committee's Views on communication No. 1354/2005, *Sudalenko v. Belarus*, of 19 October 2010, para. 6.7.

[15] The author invokes general comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, para. 15.

[16] The author cites six public statements made by the President and the Vice-President of the Supreme Electoral Court affirming the validity of circular No. 71/2014.

[17] The author cites general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, paras. 19 and 21.

have been permanent, not temporary, residents for at least the two years immediately preceding the election.

3.8 The author contends that the court that ruled on her application for *amparo* was neither independent nor impartial, in violation of article 14 (1) of the Covenant, as it was affected by interference on the part of the executive branch. She states that such interference is commonplace throughout the judicial system, as noted by the Committee and other international bodies.[18] Furthermore, the author's application for *amparo* took 40 days to process, whereas article 129 of the Constitution requires that such applications be considered and decided upon immediately, within a maximum of 48 hours.[19] She notes that three other cases brought by members of the national legislature who were dissident members of MAS and were disqualified from the subnational elections of 2015 were also unduly delayed by issues of form. The decision on *amparo* was handed down only 7 days before the deadline for the replacement of candidates and 10 days before the elections of 29 March 2015. Even if the Plurinational Constitutional Court had subsequently reversed this decision, it would have done so after the elections, meaning that the reversal would not have been an "effective" remedy.

3.9 The author maintains that the Plurinational Constitutional Court's failure to rule on the review of the *amparo* decision as at the time of submission of the present communication, despite the existence of a legally prescribed time limit, violates the principle of promptness in the conduct of proceedings (art. 14 (1) of the Covenant) and her right to an effective remedy in accordance with article 2 (3) of the Covenant. It also violates the State party's obligation to take appropriate measures to give effect to the author's political rights, in accordance with article 2 (2) of the Covenant.

3.10 The author seeks, as reparation: (a) full redress, including public satisfaction and financial compensation to cover the costs incurred for her candidate registration and election campaign, the costs of travel to La Paz to carry out formalities related to her administrative and judicial claims, and the costs of legal representation at the national and international levels; (b) the repeal or amendment of existing legislation that prevents persons who have served in the national legislature from standing as candidates for subnational positions; (c) the repeal of the constitutional and electoral provisions establishing a residency requirement as a condition for the exercise of political rights; (d) the adoption of legislation to guarantee that prompt, suitable and effective remedies are available to individuals wishing to challenge decisions of the electoral branch that infringe their political rights; and (e) the adoption of a transparent and appropriate mechanism for the election of members of the Supreme Electoral Court and the departmental electoral courts so as to ensure their independence and impartiality.

State party's observations on admissibility

4.1 In its observations dated 3 September 2015, the State party contends that the communication is inadmissible on the grounds of a failure to exhaust domestic remedies. Firstly, the author should have submitted her application for constitutional *amparo* against circular No. 71/2014 of the Supreme Electoral Court, not against the decisions that disqualified her from standing as a candidate for mayor in the 2015 elections. The author's failure to file a timely *amparo* application against circular No. 71/2014 is deemed to constitute an act of "consent" whereby the author accepted the terms of that circular. Secondly, the remedy of *amparo* incorrectly sought against decision No. 93/2015 of the

[18] The author cites, inter alia, the Committee's concluding observations on the third periodic report of the Plurinational State of Bolivia, CCPR/C/BOL/CO/3, para. 22; and the 2011 and 2014 annual reports of the Office of the United Nations High Commissioner for Human Rights (OHCHR) office in the Plurinational State of Bolivia.

[19] The relevant part of Article 129 of the Constitution provides that: "III. The authority or person against whom the application is filed shall be summoned, in the same manner as that prescribed for habeas corpus proceedings, for the purpose of providing information and, where appropriate, judicial records concerning the impugned conduct, no later than forty-eight hours from the time the application is filed. IV. The final decision shall be pronounced in a public hearing immediately upon receipt of the information from the authority or person against whom the application is filed or, in the absence of such information, shall be pronounced on the basis of the evidence produced by the applicant".

Supreme Electoral Court, which confirmed the author's disqualification, has not been exhausted, as the Plurinational Constitutional Court has not yet ruled on the review of the judgment of the supervisory court that denied *amparo*. Lastly, the author could have raised her allegations of discrimination before a criminal court or administrative body pursuant to Act No. 45 of 8 October 2010 on the prohibition of racism and all forms of discrimination.

4.2 The State party also alleges an abuse of the right of submission, because the Committee does not have the authority to "order" States parties to carry out reparation measures such as those sought by the author, especially if they go beyond the legitimate purposes served by subsidiary systems for the protection of human rights. In particular, the expenses incurred by the author for her election campaign and subsequent expenses cannot be attributed to the State party, as they resulted from negligence on the part of the author. Regarding the request for the revision of domestic provisions, the State party notes that these provisions were adopted during the author's term as a member of the legislature, and the author did not take any action against them.

4.3 Finally, the State party submits that the communication is inadmissible for lack of sufficient substantiation of the complaint based on article 26 of the Covenant. Firstly, the right to equality and the prohibition of discrimination set out in article 26 are subordinate to the other rights protected by the Covenant, meaning that violations under this article cannot be claimed independently. Secondly, the author has not substantiated her claim of unfavourable differential treatment in relation to similar situations or comparable cases, nor has she shown that the alleged differential treatment was arbitrary or unreasonable. In this regard, circular No. 71/2014 does not establish any discrimination, since it applies equally to all persons who were members of the Plurinational Legislative Assembly in the 2010–2015 term.

4.4 The State party notes that the purpose of the residency requirement for candidates is to ensure that persons who aspire to be elected to represent the interests of a regional or municipal community have direct knowledge of the socioeconomic and cultural conditions of that community. Members of the national legislature do not meet this requirement, as they do not have "permanent residency" in the region or municipality because their duties require them to live in La Paz. In addition, circular No. 71/2014 differentiates between departmental and municipal positions because departmental constituencies encompass a number of municipalities, and it would be impossible to require candidates to reside in each of them. However, the residency requirement for municipal office is justified by the need for a close relationship between the representative and the municipal community, which can be formed only through continuous residence for at least two years. Prior service as a national legislator is, however, compatible with departmental representation because deputies and senators represent their respective departments in carrying out their duties at the national level.

4.5 The State party notes that the appointment of the Vice-President of the Supreme Electoral Court is regulated by the Constitution (art. 172) and Act No. 18 on the Plurinational Electoral Branch (art. 13).

Author's comments on the State party's observations on admissibility

5.1 On 5 October 2015, the author submitted comments maintaining that the constitutional remedy of *amparo* provided for in article 129 of the Constitution is available only when the person concerned has been directly harmed.[20] According to the case law of the Plurinational Constitutional Court, *amparo* cannot be used to challenge a norm *in abstracto*, since in that case the alleged act or omission would affect overall legal situations but would have no particular significance for the citizen if he or she had not been directly and specifically harmed.[21] The remedy of *amparo* may therefore not be invoked in respect

[20] Article 129 of the Constitution: "The constitutional remedy of *amparo* shall be applicable against unlawful or improper acts or omissions that are attributable to public servants or to other individuals or bodies and that restrict, impair or threaten to restrict or impair rights that are recognized by the Constitution and the law."

[21] The author cites Plurinational Constitutional Court judgment Nos. 1844/2003 of 12 December 2003 and 1290/2011 of 26 September 2011.

of circular 71/2014. The author reiterates that ordinary domestic remedies were exhausted with the submission of an appeal to the Supreme Electoral Court and that, in any event, the review of the *amparo* decision by the Plurinational Constitutional Court is still pending, which means that the processing of her application has been unduly prolonged beyond the legally established time frame. With regard to the remedy provided for in Act No. 45, the author notes that article 12 of the Act provides that "persons who have been victims of acts of racism or discrimination may opt for constitutional, administrative or disciplinary and/or criminal remedies". The Act thus does not require the exhaustion of remedies under all types of jurisdiction. In the present case, the author chose to take action through the electoral courts, which she believed to be the most appropriate procedure, as proceedings under criminal law are not intended to provide redress for violations of political rights, but to determine criminal liability and impose penalties on those responsible.

5.2 The author submits that the principle of full redress for victims is a basic principle of international human rights law and that her specific request for measures to this effect, including compensation, reimbursement of procedural costs and revision of the relevant provisions, are common measures of reparation that have been ordered by the Committee itself. With regard to the revision of provisions, the author notes that, although she could have brought proceedings to challenge the constitutionality of subconstitutional norms, she could not have challenged the residency requirement, as it is a condition established by the Constitution itself.

5.3 The author submits that the State party has confused the nature of article 2 (1) with that of article 26 of the Covenant. Article 2 (1) requires a link with other substantive articles of the Covenant, but this is not true of article 26, which establishes a stand-alone right. In the present case, violations have been alleged both under article 26 alone and under article 26 in conjunction with article 25 of the Covenant. The author reiterates that she was the victim of unfavourable differential treatment in relation to other persons in the same situation (persons who had been members of the Plurinational Legislative Assembly in the 2010–2015 term).

State party's observations on the merits

6.1 In a submission dated 29 February 2016, the State party notes that in December 2014, the Supreme Electoral Court adopted regulations for the 2015 subnational elections (see para. 2.5) that specified that the Court could regulate technical and operational aspects of the administration and conduct of the subnational electoral process in 2015 by issuing circulars for that purpose. In this context, circular No. 71/2014 is a strictly operational instrument that clarifies the scope of constitutional rules.

6.2 The State party maintains that States parties are allowed to enact limitations or restrictions on the exercise of the rights set forth in the Covenant, provided that such restrictions are consistent with the principles of legality and proportionality. In this regard, the constitutional requirement of two years' permanent residency in the constituency where the person stands for election is intended to ensure the legitimacy and suitability of such representatives; i.e., the specific, permanent and significant ties that representatives must maintain with their constituencies. The State party notes that several countries in the region have similar provisions.[22] The electoral residency requirement is meant to ensure that representatives protect the interests of the community concerned, for which purpose they must have prior direct knowledge of the social, cultural and economic conditions in that locality. As representation at the municipal level, in particular, is distinct from departmental or national representation, given the nature of the relationship with the population, it is municipal representatives whose capacity to represent the community is most crucial.

6.3 The State party reiterates that the appointment of a member of the Supreme Electoral Court by the President of the Plurinational State is a prerogative recognized by the Constitution and domestic legislation (see para. 4.5), and this appointment procedure in no

[22] The State party cites, as examples of countries that require two years' residency prior to elections, Argentina (for senators and deputies from a province), Chile (for senators and deputies from a region) and Ecuador (for district and municipal mayors). In addition, Honduras requires five years' residency for deputies and Paraguay requires five years' residency for mayors and municipal council members.

way compromises the impartiality and competence of the electoral branch. The other six members of that Court are elected by the Plurinational Legislative Assembly.

6.4 The State party notes that the author submitted two applications for *amparo*, as the first one was rejected because of formal issues that were not rectified in a timely manner. On 18 February 2015 the author filed a new application for *amparo*, which was found admissible on 23 February 2015 and on which a hearing was held on 9 March 2015. The decision denying *amparo* was automatically referred to the Plurinational Constitutional Court, which upheld the contested decision in a judgment issued on 6 October 2015. The Court found that the person directly affected by circular No. 71/2014 was the Frente Único political coalition, since it was that entity, and not the author, that had standing to file an application for constitutional *amparo*. However, when that organization learned of the judicial decision disqualifying the author, it proceeded to replace her with another candidate.

6.5 The State party maintains that the person claiming to be a victim of discrimination bears the burden of proof, but in the present case, the author's submissions consist not of relevant evidence but of mere unfounded "speculations". The author attempts to conflate her situation as a candidate for mayor with two other situations that are completely different, namely the situation of candidates for re-election to the Plurinational Legislative Assembly and the situation of candidates for departmental office. The situation of the Plurinational Legislative Assembly members who stood for office in the Department of La Paz is likewise dissimilar, as those candidates had met the constitutional requirement of two years' residency.

6.6 The State party submits that it has complied at all times with the duty to adopt provisions that are consistent with the Covenant and to ensure that effective, relevant and timely remedies are available through both the constitutional and the electoral courts.

Author's comments on the State party's observations on the merits

7.1 On 9 May 2016, the author submitted comments contending that the two-year residency requirement established by article 285.I of the Constitution applies to all candidates for election to autonomous executive bodies at the departmental, regional and municipal levels, not only to candidates for municipal office. The only differential requirement set out in the Constitution concerns the minimum age (21 years for candidates for municipal office and 25 years for all other authorities). The author submits that the State party's argument that municipal representatives have a different relationship with the communities they represent is unreasonable and contrary to the Constitution.

7.2 The author notes that, before issuing circular No. 71/2014, the Supreme Electoral Court had previously adopted circular No. 52/2014 setting out regulations for the electoral process in the subnational elections of 2015 and specifying the acceptable means of proving two years' permanent residency. Circular No. 71/2014 was subsequently issued for the sole purpose of disqualifying Plurinational Legislative Assembly members who were dissident members of MAS by setting out specific grounds for disqualification that are not provided for in the Constitution. This is contrary to the State party's claim that the circular was of a technical and operational nature.

7.3 Regarding the constitutional residency requirement for candidates, the author points out that the legal systems of the other Latin American countries cited by the State party establish that requirement for positions other than those at the municipal level. She reiterates, in any event, that this requirement is unreasonable and discriminatory. Furthermore, under circular No. 71/2014, the residency requirement is arbitrarily and selectively applied only to certain positions and certain elections (those of March 2015); this was not the case in previous elections.

7.4 The author notes that, under article 25 (a) of the Covenant, any limitation must be imposed by means of formal laws. In this case, however, the disqualification was effected by means of an administrative circular, which does not have the status of law.

7.5 The author submits that article 14 (1) of the Covenant requires a court not only to be impartial, but also to appear to a reasonable observer to be impartial. In the present case, all the members of the Supreme Electoral Court division that decided on her appeal against the

disqualification decision were chosen because of their close ties to the governing party. She points out that one of the judges of that Court subsequently "acknowledged" to a media outlet that "it was wrong to disallow the participation of former Assembly members in the subnational elections by accepting circular No. 71/2014".[23]

7.6 The author notes that the State party has not contested her allegations regarding the lack of independence and impartiality in constitutional proceedings. She notes that all the candidates who were disqualified under circular No. 71/2014 filed appeals that were rejected by the constitutional and electoral courts. She adds that the Plurinational Constitutional Court acted inconsistently by denying her *amparo* application on the grounds that only the political organization that had put forward her candidacy had standing to file such an application, whereas, in the case of the disqualified candidate Eduardo Maldonado, *amparo* was denied because the application had been submitted by the political organization and not by the person directly concerned.

7.7 Finally, the author points out that the Plurinational Constitutional Court took 210 days to consider her appeal and issued its ruling on 6 October 2015, beyond the legal time limit of 50 days and after the subnational elections had already taken place. She was not notified of the decision until 29 March 2016. With regard to the delays in the first-instance constitutional proceedings, the author disputes the State party's claim that the delays were attributable to the author's negligence with regard to the correction of formal defects in her application. She notes that the supervisory court decided to await the outcome of the appeal filed with the Supreme Electoral Court before issuing a ruling on the merits. However, this was unnecessary in the light of constitutional jurisprudence, according to which an exception is made to the principle of subsidiarity or exhaustion of appellate remedies in the case of *amparo* applications, given the need for the immediate protection of rights from imminent and irreparable harm, as in the present case.

Additional submissions by the parties

8. In a submission of 6 November 2016, the State party reiterates its arguments on admissibility and on the merits. It notes that the purpose of circular No. 71/2014 was to "remind" candidates of the constitutional residency requirement, without distinguishing between political dissidents and pro-Government candidates.[24] It reiterates that municipalities are different from other constituencies in that they are a smaller administrative division with which representatives must have closer ties and greater familiarity.

9. On 10 March 2017, the author submitted comments stating that the State party's additional observations did not contain any new information and reaffirming her earlier contentions.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

10.2 The Committee takes note of the State party's argument that domestic remedies have not been exhausted (see para. 4.1) because: (a) the author should have filed an application for *amparo* against circular No. 71/2014 instead of filing it against the electoral court decisions that disqualified her as a candidate for mayor in the elections of March 2015; (b) the Plurinational Constitutional Court had not yet ruled on the review of the application for *amparo* at the time the communication was submitted; and (c) the author should have

[23] The author attaches an article from the newspaper *Página Siete* containing the quotation to which she refers.

[24] The State party asserts that the objectivity of this measure is demonstrated by the fact that, in the Department of Cochabamba, 15.7 per cent of the candidates who were disqualified from the 2015 subnational elections were pro-Government candidates.

brought her complaint of discrimination before a criminal court or administrative body pursuant to Act No. 45 on the prohibition of racism and all forms of discrimination. However, the Committee notes the author's claim — which is not refuted by the State party — that the Constitutional Court has held that the remedy of *amparo* cannot be sought against a norm *in abstracto* and the individual concerned must have been directly and specifically harmed (see para. 5.1). The Committee also notes that the Constitutional Court's judgment of 6 October 2015 upheld the decision on the *amparo* application, with the result that constitutional remedies appear to have been exhausted (see paras. 6.4 and 7.7). Lastly, the Committee takes note of the author's claim that Act No. 45, to which the State party refers, does not require that all possible legal avenues be exhausted and that the electoral courts were the most appropriate means of obtaining redress for violations of political rights (see para. 5.1). Accordingly, the Committee considers that article 5 (2) (b) of the Optional Protocol does not constitute a barrier to the admissibility of the communication.

10.3 The Committee takes note of the State party's argument that the author has abused the right of submission because the reparation sought goes beyond the purview of the Committee and the harm suffered was in any event the result of the author's negligence (see para. 4.2). However, the Committee points out that under the procedure established by the Optional Protocol, when it finds violations of the Covenant it is competent to determine the reparation measures that the State party should take in order to remedy the harm caused and prevent future violations. Thus, there is nothing to prevent the authors of communications from requesting or proposing measures of redress, although the Committee is not bound by any such requests. Furthermore, the Committee considers that the determination of whether there was negligence on the author's part in the context of her actions at the national level is closely related to the merits of the case. The Committee therefore considers that article 3 of the Optional Protocol does not constitute a barrier to the admissibility of the communication.

10.4 The State party has also argued that the author's complaint under article 26 of the Covenant has not been sufficiently substantiated, asserting that that article cannot be invoked independently and that the author did not provide examples of similar situations to justify her claim of unfavourable discriminatory treatment (see para. 4.3). The Committee recalls, however, that article 26 of the Covenant does not merely duplicate the guarantee already provided for in article 2 (1) but establishes an autonomous right.[25] Furthermore, the Committee notes that the author has provided sufficient arguments to substantiate the claim that she was treated less favourably than other candidates in the subnational elections of 2015 (see paras. 3.2–3.8), and considers that these claims should be examined on the merits.

10.5 The Committee takes note of the author's claim, based on article 14 (1) of the Covenant, that the electoral branch is not independent or impartial (see paras. 3.5–3.7). The Committee also notes, however, that the actions of that branch that are described by the author refer to cases that are different from the present case, which relates to the author's disqualification as a candidate for mayor in the 2015 elections. The Committee finds that the author has also failed to show how the composition of the Supreme Electoral Court detracted from its independence in ruling on her appeal. Moreover, she has not shown that the independence of the members of that Court was not duly safeguarded by the manner in which they were chosen. Lastly, the Committee observes that the statements in support of circular No. 71/2014 that were made by members of the Court before the issuance of decision No. 93/2015 were of a general nature and did not refer to the author's disqualification. Consequently, the Committee finds that the author has not sufficiently substantiated this claim, made on the basis of article 14 (1) of the Covenant as it did not preserve the independence of the Supreme Electoral Court in law and in practice, and declares it inadmissible under article 2 of the Optional Protocol.

10.6 The Committee also takes note of the author's claims under article 14 (1) of the Covenant relating to the alleged interference of the executive branch in the court that ruled on her application for *amparo*, which could have affected the court's independence (see para. 3.10). However, the Committee observes that the author has not provided any specific

[25] See general comment No. 18 (1989) on non-discrimination, para. 12.

information to back up her claim regarding interference by the executive in the constitutional proceedings concerning her application for *amparo*. Consequently, the Committee is of the view that the author has not adequately substantiated this part of the complaint and declares it inadmissible under article 2 of the Optional Protocol.

10.7 With regard to the author's claims under articles 2 (2) and 2 (3) of the Covenant, concerning the issuance of the Plurinational Constitutional Court's ruling after the legally established deadline (see paras. 2.10–2.11 and 3.8–3.9), the Committee recalls its jurisprudence to the effect that the provisions of article 2 of the Covenant set forth a general obligation for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.[26] Consequently, the Committee declares this part of the communication to be incompatible with the provisions of the Covenant and inadmissible under article 3 of the Optional Protocol.

10.8 However, the Committee finds that the author's claims under articles 25 and 26 of the Covenant, concerning her disqualification as a candidate for mayor in the subnational elections of 2015, as well as the claims under article 14 (1) of the Covenant, concerning the undue delay in the constitutional proceedings on her application for *amparo*, have been sufficiently substantiated for the purpose of admissibility, declares them admissible and proceeds to consider them on the merits.

Consideration of the merits

11.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee takes note of the author's claims under article 25 of the Covenant that she was deemed ineligible to stand for election to the office of mayor of the Province of Cercado, Department of Cochabamba, under the terms of circular No. 71/2014 issued by the Supreme Electoral Court; that this circular prohibited persons who were members of the Plurinational Legislative Assembly in the 2010–2015 term from standing for election to municipal or regional office in 2015, while excluding department-level positions from this prohibition, for reasons that were left unspecified; that this prohibition diverged, with no justification whatsoever and without the required legal basis, from the interpretation and practice that had been followed until that time, given that, while articles 149, 285.I and 287.I of the Constitution set out a "permanent residency" requirement for all candidates to parliamentary and executive office, the electoral branch had decided that voter registration in the constituency in question should be deemed to constitute proof of such residency; that the Supreme Electoral Court itself had until that time held that members of the national Assembly had permanent residency in the departments they represented, not in La Paz, where they carried out their legislative duties; and that, with the introduction of this prohibition, the Supreme Electoral Court went beyond its power to regulate technical issues by means of circulars, thereby unlawfully and unreasonably restricting the author's right to stand for election to the office in question (see paras. 2.3–2.6 and 3.1–3.4).

11.3 The State party has argued that circular No. 71/2014 is a rule of a technical and operational nature intended merely to serve as a reminder of the constitutional requirement that candidates must have resided in the constituency in which they are seeking office for at least the two years preceding the election (see paras. 4.4 and 6.1). However, without ruling on the interpretation and application of internal legislation, the Committee notes that circular No. 71/2014 prevented a number of persons who had been members of the Plurinational Legislative Assembly (deputies and senators) in the 2010–2015 term from standing for election to municipal councils, among other positions, in 2015. The Committee also notes that, on the basis of the interpretation established in circular No. 71-2014, the author was unable to stand for election as mayor because she had served as a deputy during the previous legislative session. The Committee is thus of the view that circular No. 71/2014 and the electoral court decisions issued pursuant to that circular, whereby the

[26] See, inter alia, *Poliakov v. Belarus*, communication No. 2030/11, para. 7.6.

author was declared to be ineligible to run for that office, restricted her right to stand for election as mayor in the subnational elections of 29 March 2015.

11.4 The Committee must therefore decide whether this restriction was warranted. The Committee recalls that the exercise of the rights recognized in article 25 of the Covenant, including the right to stand for election, may not be suspended or excluded except on grounds that are established by law and that are objective and reasonable.[27]

11.5 In the present case, the State party has argued that the intent of the constitutional residency requirement for candidates is to ensure that representatives have direct knowledge of the socioeconomic and cultural conditions of the communities they represent and that the duty of representation is especially incumbent on municipal representatives because of the close relationship that they must have with the locality (see paras. 4.4 and 6.2). The Committee notes, however, that the State party has not explained why a candidate such as the author would cease to be aware of the socioeconomic and cultural situation of the community from which she comes, which she represents and where she has her habitual residence, merely because she was a deputy in the previous legislative term and had to go to La Paz on a regular basis to attend meetings of the legislature in the discharge of her duties, while returning to her permanent residence in Cochabamba on weekends and for the weekly meetings she chaired in that city as a party leader (see para. 3.1). The State party has also failed to argue convincingly that the office of municipal (or regional) representative differs substantially from that of representatives of other constituencies (national and departmental), to such a degree that it warrants a significant distinction that is not provided for in the Constitution or domestic legislation (see paras. 2.3–2.5). Lastly, the Committee notes that, as the author argues and the State party does not dispute, that interpretation was introduced for the first time in the context of the 2015 municipal elections and had not been applied to previous municipal elections (see paras. 2.6 and 7.3). In the light of the foregoing, the Committee finds that the author's disqualification under circular No. 71/2014 was not based on objective and reasonable criteria that were clearly established by law. Accordingly, the disqualification of the author as a candidate for mayor in the 2015 elections unduly restricted her rights under article 25 of the Covenant, in violation of that provision.

11.6 Having found a violation of article 25 of the Covenant, the Committee will not separately consider the claim that the same acts constituted a violation of article 26 of the Covenant.

11.7 The Committee takes note of the author's claim that the constitutional proceedings concerning her application for *amparo* suffered from undue delays, in violation of article 14 (1) of the Covenant. The author contends, in particular, that the adjudication of her application for *amparo* in first and second instance was delayed beyond the legally established time frames, with the result that the Plurinational Constitutional Court's ruling was issued after the elections had already taken place. She also states that she was not given due notice of several hearings that were scheduled during the proceedings at first instance and that this resulted in repeated postponements. She further contends that the Constitutional Court rejected the application on the grounds that it should have been filed by the political organization Frente Único, whereas, in the case of another person who was disqualified under the same circular, the same Court rejected *amparo* because the application had been filed by the political organization rather than the person concerned (see paras. 2.10–2.11, 3.8–3.9 and 7.6–7.7).

11.8 The Committee recalls that an important aspect of the fairness of a hearing is its expeditiousness and that delays that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in article 14 (1).[28] In the present case, the Committee notes that the State party has attributed the delays in the court's decision at first instance to the author's negligence in failing to address issues of form (see para. 6.4). The author notes, however, that several scheduled hearings were successively postponed because they were not duly communicated to the Department of Cochabamba and, subsequently, because the case file was not transmitted to that

[27] See general comment No. 25, paras. 4 and 15.

[28] See general comment No. 32, para. 27.

department and that the supervisory court postponed its ruling because it considered that it should await the decision of the Supreme Electoral Court, contrary to constitutional jurisprudence (see paras. 2.10 and 7.7). The Committee notes that the State party has not provided any information that contradicts these allegations or explains why the decision on the author's application for *amparo* was delayed despite the existence of a legally established time limit. The State party likewise has not justified the Plurinational Constitutional Court's delay in adopting a review judgment on the *amparo* application, particularly considering that *amparo* was ultimately denied for technical reasons (see para. 6.4). In the light of the foregoing, the Committee finds that the undue delays that affected the constitutional proceedings concerning the author's application for *amparo* constituted a violation of her right under article 14 (1) of the Covenant.

12. The Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant, is of the view that the facts before it disclose a violation of articles 14 (1) and 25 of the Covenant.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose Covenant rights have been violated. In this regard, the State party should, among other measures, offer adequate compensation to the author, including the costs of legal representation at the national and international levels. The State party is also under an obligation to take appropriate steps to prevent similar violations in the future, including by ensuring that election regulations and their application are consistent with article 25 of the Covenant.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, have them translated into the official languages of the State party and disseminate them widely.